No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1957

PETER S. HOSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 77

BERTRAM S. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of using the mails to facilitate a gambling enterprise, in violation of 18 U.S.C. 1952. On November 19, 1965, he was sentenced to two years' probation and fined $2,000. The court of appeals affirmed (Pet. App. A).

The evidence, which is not in dispute, showed that on January 11, 1965, two F.B.I. agents obtained an envelope and several sheets of paper from an overturned trash can on an open lot adjacent to petitioner's house (A. 25a, 29a).[1] The papers were discovered to be "run-down sheets," on which were

[1] "A." refers to petitioner's appendix in the court below, filed with the Clerk of this Court.

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printed schedules of football games for the week ending January 10, 1965, and of the bowl games played on or about January 1, 1965. In the envelope were several run-down sheets for games played during the week ending January 3, 1965 (A. 27a). The envelope was machine stamped, and bore markings indicating that it had been mailed on December 28, 1964, from Chicago, Illinois to petitioner in Nashville, Tennessee (A. 25a–27a). The agents also found a discarded slip of paper on which had been noted the names of certain teams scheduled to play football games and the anticipated "point spread," the number of points by which the favorite was expected to win. Some of the printed run-down sheets also contained handwritten notations of point spreads (A. 27a).

At trial, one of the agents who had obtained the evidence testified that two months after the search he had interviewed petitioner (A. 19a). After advising petitioner of his right to counsel and to remain silent, and that anything he stated could be used against him in a court of law, the agent asked what business petitioner engaged in. Petitioner replied that he had two businesses, one of which was "booking" bets on ball games (A. 20a). On further questioning, petitioner told the agent that he had subscribed to the run-down sheets and was at that time receiving them through the mails. Petitioner indicated that he used the sheets as an expeditious means of following the progress of each game as it was played (A. 22a–24a). Petitioner also acknowledged that he had a current wagering tax stamp, and had been filing the required

monthly excise tax returns (A. 20a–21a). Petitioner's applications for registration (Treasury Department Form 11–C) and his wagering excise tax returns (Treasury Form 730) for the period July 1, 1963 to March, 1965, were introduced in evidence (A. 16a–19a).

The sole question presented by the petition for certiorari involves the admissibility in evidence of the federal registration statements and wagering excise tax returns. Petitioner did not object to their admission at trial, except insofar as they reflected activity in which he had engaged prior to the date of the indictment (A. 18a). Nor was this issue raised in the court of appeals.

Since the issue was not properly preserved, there is no occasion to consider it at the *certiorari* stage of this case. See *United States* v. *Indiviglio*, 352 F. 2d 276 (C.A. 2), certiorari denied, 383 U.S. 907.[2]

[2] Had the issue presently raised been properly preserved, its resolution might be controlled by the decisions in *Marchetti* v. *United States*, No. 38, and *Grosso* v. *United States*, No. 181, both last term, restored to the docket for reargument as Nos. 2 and 12, this Term. If, in those cases, the Court's prior decision in *United States* v. *Lewis*, 348 U.S. 419, is followed, petitioner's conviction would appear to involve no violation of his Fifth Amendment rights. Should the Court, however, adopt a use-restriction rule, as alternatively suggested in the government's briefs in Nos. 41 and 181, the challenged evidence would be excludable. See the government's brief in No. 41, last Term, p. 24; see also the government's memorandum in *Raincater* v. *Florida*, No. 555, last Term (No. 18, this Term).

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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